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No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

LILLIE E. PARKER, *et al.*, and SIMILARLY SITUATED UNNAMED PLAINTIFFS,

Petitioners,

v.

GWENDOLYN KING, Commissioner of the Social Security Administration, LOUIS SULLIVAN, Secretary, Department of Health and Human Services, and the UNITED STATES OF AMERICA.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the regional circuit courts of appeals have appellate jurisdiction over suits brought by federal employees under the Fair Labor Standards Act because the FLSA, in conjunction with 28 U.S.C. 1331, supplies an independent basis for district court jurisdiction, or whether the United States Court of Appeals for the Federal Circuit has exclusive jurisdiction over such claims on the grounds that the Little Tucker Act, 28 U.S.C. 1346 (a)(2), provides the sole basis for district court jurisdiction.

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MISCELLANEOUS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No.

LILLIE E. PARKER, *et al.*, and SIMILARLY SITUATED UNNAMED PLAINTIFFS,

Petitioners,

v.

GWENDOLYN KING, Commissioner of the Social Security Administration, LOUIS SULLIVAN, Secretary, Department of Health and Human Services, and the UNITED STATES OF AMERICA.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, Lillie E. Parker and similarly situated unnamed plaintiffs, petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is published at 935 F.2d 1174. The order of the court of appeals denying a petition for rehearing with suggestion

for rehearing *en banc* (*id.* at 9a) is not published. The opinion of the district court (*id.* at 10a-17a) is unpublished.

JURISDICTION

The order of the court of appeals, denying a petition for rehearing and suggestion for rehearing *en banc*, was entered on November 12, 1991. Upon Petitioners' Motion, by Order of Justice Kennedy, the time for filing a petition for a writ of certiorari was extended to March 23, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are 28 U.S.C. 1295(a)(2); 1331; and 1346(a)(2) and 29 U.S.C. 216(b). They are set forth in Pet. App., *infra*, at 18a-20a.

STATEMENT

1. This case arose out of a suit for overtime pay brought on behalf of over 1300 employees of the Social Security Administration (SSA) in the United States District Court for the Northern District of Georgia pursuant to Section 16(b) of the Fair Labor Standards Act (FLSA), 29 U.S.C. 216(b).[1] In the district court, the government defendants successfully moved on venue grounds to transfer the claims of non-resident plaintiffs to the Claims Court. Pet. App. 10a-17a.

The government defendants had also filed a motion in the district court to dismiss the claims of all 1300 plaintiffs for lack of subject matter jurisdiction. They contended that the Civil Service Reform Act (5 U.S.C. 7121(a)) had impliedly extinguished the plaintiffs' statutory rights to prosecute FLSA violations in court (29 U.S.C. 216(b)), and made a union-controlled negotiated griev-

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[1] A list of the SSA employees who have filed consents to opt-in to the lawsuit as plaintiffs is contained in Pet. App. 21a-37a, *infra*.

ance arbitration procedure their exclusive remedy for enforcing the Act.

2. The district court stayed its decision on the government's motion to dismiss, pending a ruling by the United States Court of Appeals for the Federal Circuit on the same issue in the case of *Carter v. Gibbs*, 909 F.2d 1452 (Fed. Cir. 1990). In the meantime, the United States Court of Appeals for the Eleventh Circuit granted interlocutory review of the district court's venue decision. Within days after oral argument on the interlocutory appeal, the Federal Circuit issued an *en banc* decision in *Carter*. It held that the Civil Service Reform Act (at 5 U.S.C. 7121(a)) deprives federal courts of subject matter jurisdiction over the FLSA claims of federal employees who are covered by collective bargaining agreements that permit them to grieve and arbitrate FLSA violations. The Eleventh Circuit held the appeal in abeyance pending this Court's disposition of a petition for a writ of certiorari filed in *Carter*.

3. After certiorari was denied in *Carter* (111 S. Ct. 46 (1990)), and following supplemental briefing and a second oral argument, the court of appeals for the Eleventh Circuit transferred the case, on the government's motion, to the Federal Circuit. Because the court believed that the Tucker Act provides the sole basis for a district court to hear an FLSA claim against the federal government, it held (Pet. App. 8a) that the Federal Circuit has exclusive jurisdiction over this appeal. *See* 28 U.S.C. 1295(a)(2) (giving the Federal Circuit exclusive appellate jurisdiction where the district court's jurisdiction "was based in whole or in part" on the Tucker Act).

The court of appeals rejected petitioners' argument that, under this Court's recent decision in *Bowen v. Massachusetts*, 487 U.S. 879 (1988), the FLSA's waiver of sovereign immunity, in conjunction with the federal question statute (28 U.S.C. 1331), provides an independent basis for district court jurisdiction over the FLSA

claims of federal employees. *See* 487 U.S. 910, n.48 (observing that Tucker Act jurisdiction is exclusive "only to the extent that Congress has not granted any other court authority to hear the claims that may be decided by the Claims Court"). It opined that "the Little Tucker Act, rather than the FLSA, more easily accommodates the sort of allegations that the appellants present today." Pet. App. 7a. It observed that the Tucker Act is "all-inclusive," that the FLSA does not itself vest jurisdiction in a particular court, and that the FLSA's legislative history did not show that Congress intended to "supplant the Tucker Act" when it permitted suit against the federal government in "any court of competent jurisdiction." *Id.*, citing *Brooks v. Weinberger*, 637 F. Supp. 22, 24 (D.D.C. 1986).

On the basis of its conclusion that the district court's jurisdiction was based solely on the Tucker Act, the panel ruled that the appeal must be heard by the Federal Circuit. It ordered the appeal transferred and subsequently denied a petition for rehearing with suggestion for rehearing *en banc*. Pet. App. 9a.

REASONS FOR GRANTING THE PETITION

This case raises an important and recurring issue of federal court jurisdiction upon which the circuit courts are in conflict. In *Bowen v. Massachusetts*, this Court confirmed that Tucker Act jurisdiction is "exclusive," "only to the extent that Congress has not granted any other court authority to hear claims that may be decided by the Claims Court." 487 U.S. at 910, n.48. The lower court's ruling that the Tucker Act provides the exclusive jurisdictional basis for FLSA claims against the federal government is inconsistent with *Bowen* and conflicts with the rulings of the courts of appeals for the Second, Eighth, and D.C. Circuits. Those courts have squarely held that district courts may exercise jurisdiction under the federal question statute, 28 U.S.C. 1331, irrespective of the Tucker Act, where, as here, a statute waives sov-

ereign immunity by authorizing a suit against the federal government in "any court of competent jurisdiction." 29 U.S.C. 216(b).

This Court's review is warranted to resolve the conflict. First, resolution of the question presented has important ramifications for federal court jurisdiction. The federal government and opposing parties have frequently litigated the jurisdictional question at issue; and significant judicial resources have been devoted to resolving it. Without definitive instruction from the Court, the issue can be expected to continue to arise.

In addition, resolution of the issue raised here has a substantial impact on enforcement of the Fair Labor Standards Act. As explained more fully below, if the Federal Circuit possesses exclusive jurisdiction over cases such as this one, it will mean, given that court's ruling in *Carter*, *supra*, that hundreds of thousands of federal workers will be unable to judicially enforce their FLSA claims. They will instead be relegated to a union-controlled grievance-arbitration procedure.

1. The United States Court of Appeals for the Federal Circuit has exclusive appellate jurisdiction where the jurisdiction of the district court "was based in whole or in part on section 1346" of Title 28 (28 U.S.C. 1295(a)(2)). If, however, the district court has jurisdiction over a case independent of section 1346, the regional circuit courts retain their ordinary appellate jurisdiction.[2]

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[2] *See Zellous v. Broadhead Associates*, 906 F.2d 94, 96 (3d Cir. 1990) (regional circuit retains appellate jurisdiction irrespective of whether district court could have asserted jurisdiction under the Tucker Act where Administrative Procedure Act provides separate waiver of sovereign immunity); *Van Drasek v. Lehman*, 762 F.2d 1065, 1070-1071 (D.C. Cir. 1985) (Federal Circuit jurisdiction not exclusive where "claim brought under statutes that independently confer jurisdiction upon the district court and waive sovereign immunity for money claims against the United States"); *cf. Christianson v. Colt Industries Operating Group*, 486 U.S. 800, 810 (1988) (Federal Circuit jurisdiction not exclusive where jurisdic-

The Tucker Act establishes the jurisdiction of the Claims Court to hear claims against the United States that are based upon the Constitution, upon a statute, upon an executive regulation, or upon a contract. 28 U.S.C. 1491. The "Little Tucker Act," 28 U.S.C. 1346(a)(2), gives the district court concurrent jurisdiction over such claims, when they do not exceed $10,000. The Tucker Act serves as a catch-all provision that waives the sovereign immunity of the United States for these claims. *United States v. Mitchell*, 463 U.S. 206, 216 (1983).[3]

In *Bowen v. Massachusetts*, this Court clarified that although it was "often assumed that the Claims Court has exclusive jurisdiction of Tucker Act claims for more than $10,000 . . . [t]hat assumption is not based on any language in the Tucker Act granting such exclusive jurisdiction to the Claims Court." Tucker Act jurisdiction, the Court explained, is exclusive "only to the extent that Congress has not granted any other court authority to hear the claims that may be decided by the Claims Court." 487 U.S. at 910, n.48.[4]

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tion of district court not based "in whole or in part" upon 28 U.S.C. 1338, conferring jurisdiction for cases arising under patent laws, because plaintiff may be entitled to relief on grounds wholly independent of the patent laws).

[3] Because the Tucker Act is a catch-all provision, to bring suit, an individual with a claim for money damages against the United States must also be able to identify a source of substantive law that "'can fairly be interpreted as mandating compensation by the federal government for the damage sustained'." *United States v. Testan*, 424 U.S. 392, 400 (1976), *quoting Eastport S.S. Corp. v United States*, 372 F.2d 1002, 1009 (Ct. Cl. 1967).

[4] Thus, *Bowen* rejects the reasoning of decisions like *Graham v. Henegar*, 640 F.2d 732 (5th Cir. 1981), which the court below cited (Pet. App. 5a). Ruling that FLSA claims against the federal government must be heard by the Claims Court where they exceed $10,000, *Graham* opined that the Tucker Act is the exclusive basis for jurisdiction over all non tort claims against the United States that exceed $10,000, "even though the claim would otherwise fall

The lower court's decision that the Tucker Act provided the exclusive basis for the district court's jurisdiction in this case collides with this principle set forth in *Bowen*. Employees with FLSA claims against the federal government need *not* rely upon the general grant of jurisdiction in the Tucker Act to supply the federal government's consent to be sued. Section 16(b) of the FLSA provides that "any employer who violates [the minimum wage and overtime provisions of the FLSA] shall be liable to the employee or the employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and an additional amount as liquidated damages" and authorizes employees to bring suit against "any employer (including a public agency) in any Federal or State court of competent jurisdiction." 29 U.S.C. 216(b).

Section 1331 of Title 28, in turn, establishes that U.S. district courts are courts of "competent jurisdiction" to hear FLSA claims, by giving them original jurisdiction over claims that arise under the laws of the United States. The catchall Tucker Act, therefore, is not not a necessary basis for the exercise of jurisdiction by the district court. Accordingly, the court of appeals below retained its ordinary appellate jurisdiction.[5]

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within the coverage of some other statute conferring jurisdiction on the district court." 640 F.2d at 734.

The court of appeals also erred in citing *Brown v. General Services Administration*, 425 U.S. 820 (1976) for the proposition that the Tucker Act is a "specific provision controlling suits against the government," which should govern over "general ones" like the FLSA. Pet. App. 6a-7a. *Brown* merely held that a "precisely drawn, detailed statute [Title VII of the Civil Rights Act]" with an extensive scheme of administrative remedies that federal employees must exhaust "preempts more general remedies" for discrimination. 425 U.S. at 824. Here, it is the Tucker Act that is a "general" catchall provision. *See supra* n.3.

[5] The court below, apparently in an effort to distinguish *Bowen* from this case, emphasized that because Massachusetts sought a

2. The court below concluded that the Tucker Act is the exclusive basis for district court jurisdiction over the FLSA claims of federal employees because the FLSA itself does not vest jurisdiction in any particular court, but simply provides that the United States may be sued "in any court of competent jurisdiction." Pet. App. 7a.[6] That conclusion conflicts with the rulings of a number of other circuit courts, which have found an independent basis for district court jurisdiction in general jurisdictional statutes—including 28 U.S.C. 1331—where, as here, a statute allows suit against the federal government "in any court of competent jurisdiction."

Recently, in *C.H. Sanders Co. v. BHAP Housing Development Fund Co., Inc.*, 903 F.2d 114 (2d Cir. 1990), for example, the Second Circuit held that section 1702 of the National Housing Act (12 U.S.C. 1702), which authorizes the Secretary of Housing and Urban Development to "sue or be sued in any court of competent jurisdiction, State or Federal," constituted a waiver of the federal government's sovereign immunity. It further held

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declaratory judgment and injunctive relief, the Claims Court "might prove an inadequate forum" for its claims. Pet. App. at 6a. *Bowen*'s result, however, did not depend solely upon the fact that the Claims Court could not award declaratory and injunctive relief. This Court concluded that *even if* a claimant could obtain monetary relief in Claims Court, that would not bar his recourse to district court, if Congress had granted the district court the authority to hear the monetary claim on an independent basis. *See* 487 U.S. at 910, n.48.

[6] The court cited three considerations (Pet. App. 7a): that "the FLSA does not grant jurisdiction in a particular court," that the legislative history of section 16(b) of the FLSA does not indicate that its purpose was to "supplant the Tucker Act," and that because the Tucker Act is "all-inclusive," "[a]bsent a specific Congressional grant of jurisdiction in a particular court . . . . the Tucker Act applies to any claim brought against the United States." Taken together, these three factors comprise a single rationale: in the opinion of the court below, because the FLSA does not include a specific grant of jurisdiction to the district court, and because the Tucker Act is applicable, the Tucker Act is exclusive.

that the federal question statute conferred jurisdiction on the district court. It specifically rejected the government's argument that the Tucker Act displaces an otherwise valid exercise of federal question jurisdiction in the district court. *Id.* at 119-120. The court held that section 1331 jurisdiction may be asserted over a claim in district court "provided there is an independent waiver of sovereign immunity outside the Tucker Act." *Id.* at 119.

The D.C. Circuit had reached a similar conclusion in *Trans-Bay Engineers & Builders, Inc. v. Hills*, 551 F.2d 370, 376-77 (D.C. Cir. 1976). It relied upon section 1702's "sue or be sued" language to establish a waiver of the federal government's sovereign immunity. In light of that independent waiver, the court held that the district court could exercise jurisdiction over claims that would otherwise be based on the Tucker Act, by virtue of either its diversity jurisdiction (28 U.S.C. 1332) or federal question jurisdiction (28 U.S.C. 1331). 551 F.2d at 376-77; *see also Industrial Indemnity, Inc. v. Landrieu*, 615 F.2d 644, 647 (5th Cir. 1980) (relying upon section 1331); *Bor-Son Building Corporation v. Heller*, 572 F.2d 174, 181-82 (8th Cir. 1978) (relying upon 28 U.S.C. 1442(a)(1) as the basis of district court jurisdiction).[7]

The decision of the Eleventh Circuit below—which found the Tucker Act exclusive because the FLSA itself does not vest jurisdiction in the district court—conflicts

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[7] *See also Ferguson v. Union National Bank of Clarksburg*, 126 F.2d 753 (4th Cir. 1942) (National Housing Act allows suit against Administrator in "any court of competent jurisdiction;" district courts therefore not limited to Tucker Act's $10,000 ceiling); *Ghent v. Lynn*, 382 F. Supp. 879 (D.Conn. 1975) (National Housing Act waives sovereign immunity by permitting suit against Secretary in "any court of competent jurisdiction;" 28 U.S.C. 1331 establishes jurisdiction in district court); *cf. Portsmouth Redevelopment and Housing Authority v. Pierce*, 706 F.2d 471, 475 (4th Cir.), *cert. denied*, 464 U.S. 960 (1983) ("sue and be sued" statute does not give district courts jurisdiction because it does not contain language "in any court of competent jurisdiction, State or Federal").

directly with these rulings. The FLSA contains the same operative language as section 1702 of the Housing Act (addressed in *C.H. Sanders* and *Trans-Bay Engineers*)—permitting the United States to be sued "in any court of competent jurisdiction, State or Federal." 29 U.S.C. 216(b). Under the decisions of the other courts of appeals, that waiver of sovereign immunity, in conjunction with the federal question statute, provided an independent basis for the exercise of jurisdiction by the district court.

In the wake of *Bowen*—which confirms that Tucker Act jurisdiction is not exclusive when Congress has created an independent basis for the exercise of jurisdiction by a federal district court—this conflict merits resolution by this Court. Even before the ruling in this case, "the circuits appear[ed] to be split on the question of whether the Tucker Act will limit section 1331 jurisdiction where another statute has been construed as a waiver of sovereign immunity." *Spectrum Leasing Corporation v. United States*, 764 F.2d 891, 895 n.8 (D.C. Cir. 1985). The Ninth Circuit, like the Eleventh here, has held Tucker Act jurisdiction exclusive even where a statute makes the government subject to suit in a "court of competent jurisdiction," if the statute does not specify jurisdiction in the district court. *See Munoz v. Small Business Administration*, 644 F.2d 1361, 1365 n.3 (9th Cir. 1981), citing *Marcus Garvey Square, Inc. v. Winston Burnett Construction Co.*, 595 F.2d 1126 (9th Cir. 1979); *Pacificorp v. Federal Energy Regulatory Commission*, 795 F.2d 816, 825-827 (9th Cir. 1986) (Wallace, J., concurring).[8]

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[8] *See also Zumerling v. Devine*, 769 F.2d 745 (Fed. Cir. 1985). In *Zumerling*, the Federal Circuit held that the FLSA does not confer jurisdiction on the district courts to hear claims that exceed $10,000, because the Act (at section 216(b)) provides for jurisdiction in "any court of competent jurisdiction," without specifying jurisdiction in the district court. 769 F.2d at 749. It is unclear from *Zumerling* whether the Federal Circuit considered the possibility that the federal question statute might provide an independent basis for subject matter jurisdiction.

Review by this Court is especially warranted because the jurisdictional question upon which the circuit courts are in conflict is an important one. The exclusivity of the Tucker Act affects whether the district courts can assert jurisdiction in cases where claims against the United States exceed $10,000. It also determines, as in this case, the appropriate venue provision to apply in district court and the proper appellate tribunal.

3. Finally, the lower court's decision merits review because it unduly expands the Federal Circuit's appellate jurisdiction, and also undermines enforcement of the FLSA in the federal sector. In granting the court of appeals for the Federal Circuit exclusive jurisdiction over patent and other specialized subject matter cases, as well as cases that arise in whole or in part under the Tucker Act, Congress' motivating concern was to promote uniformity in certain areas of the law. *United States v. Hohri*, 482 U.S. 64, 71-72 (1987). Its aim was to create an appellate tribunal that could supply, in these areas, "reasonably quick and definitive answers to legal questions of nationwide significance." S. Rep. No. 97-275, 97th Cong., 2d Sess. 3, *reprinted in*, 1982 U.S. Code Cong. & Admin. News 11, 13.

It is inherently impossible for the Federal Circuit to develop definitive expertise in federal sector FLSA cases. In extending the FLSA to the federal sector, Congress did not create a specialized body of law; in fact, it intended that the FLSA be interpreted in the federal sector in a manner consistent with its application in the private sector. *See American Federation of Government Employees v. OPM*, 821 F.2d 761, 769-71 (D.C. Cir. 1987). Resolution of FLSA cases in the federal sector, like the resolution of claims under Title VII of the Civil Rights Act or other similar remedial legislation, requires application of the same principles that the regional circuits apply to private sector cases; the Federal Circuit can develop no par-

ticular ability to provide definitive answers to FLSA questions, as it can with patent issues or federal contract questions.

Restricting federal employees to a single appellate tribunal, moreover, undermines Congress' intent that they be afforded the same rights as their private sector counterparts. Indeed, given the Federal Circuit's ruling in *Carter*, the lower court's decision (which accords the Federal Circuit exclusive jurisdiction over federal sector FLSA claims) means that, unlike employees in the private sector, petitioners and hundreds of thousands of other federal workers who are subject to the provisions of a collective bargaining agreement cannot judicially enforce their FLSA claims. They are relegated to a union-controlled negotiated grievance-arbitration procedure. *Cf. Barrentine v. Arkansas-Best Freight System*, 450 U.S. 728, 739-40 (1981) (recognizing that section 16(b) of the FLSA is a critical provision of that Act because it "grants individual employees broad access to the courts" and ruling that private sector employees may pursue civil enforcement actions irrespective of the grievance-arbitration provisions of collective bargaining agreement).

The *Carter* decision completely undermines the FLSA's enforcement scheme by subordinating the rights of individual federal employees to prosecute their FLSA claims in court to the procedures agreed upon by their union in collective bargaining, directly contrary to this Court's teachings in *Barrentine*. "[T]he FLSA rights petitioners seek to assert . . . are independent of the collective bargaining process. They devolve on petitioners as individual workers, not as members of a collective organization." *Barrentine*, 450 U.S. at 745; *see also Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974); *McDonald v. City of West Branch, Michigan*, 466 U.S. 284 (1984). Nonetheless, if the lower court's decision stands, all future FLSA cases will be governed by the *Carter* decision, which is directly antithetical to these principles.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 89-8540

LILLIE E. PARKER, BESSIE H. ROWLAND, CARTER G. DUNLAP, CYNTHIA JONES, and other similarly situated individuals,

Plaintiffs-Appellants,

v.

GWENDOLYN KING, Commissioner, Social Security Administration, and LOUIS W. SULLIVAN, Health and Human Services,

Defendants-Appellees.

July 12, 1991

Appeal from the United States District Court
for the Northern District of Georgia

Before EDMONDSON, Circuit Judge and HILL * and HENDERSON, Senior Circuit Judges.

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* See Rule 34-2(b), Rules of the U.S. Court of Appeals for the Eleventh Circuit.

HILL, Senior Circuit Judge:

Appellants, employees of the Social Security Administration, contend that the district court for the Northern District of Georgia has jurisdiction over their claim for overtime violations by virtue of the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.* Appellants assert that since they invoked the jurisdiction of the district court under the "federal question" statute, 28 U.S.C. § 1331, as well as under the "Little Tucker Act," 28 U.S.C. § 1346 (a)(2), this court has jurisdiction to hear their appeal. Appellees, by contrast, characterize appellants' allegations as claims arising solely under the Little Tucker Act, and therefore insist that only the Federal Circuit Court of Appeals has jurisdiction to hear this appeal. We agree with appellees, and transfer this appeal to the United States Court of Appeals for the Federal Circuit.

BACKGROUND

Four employees of the Social Security Administration began this action in 1987, on behalf of themselves and similarly situated employees, seeking reimbursement for alleged overtime violations of the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.* ("FLSA"). All four of the original plaintiffs reside in the Northern District of Georgia. A fifth named plaintiff, a resident of Illinois, joined the suit by amended complaint. In addition, approximately 1300 plaintiffs from across the country have filed consents to opt in as party plaintiffs, pursuant to Section 16(b) of the FLSA, 29 U.S.C. § 216(b).

Plaintiffs endeavored to invoke the jurisdiction of the district court under the "federal question" statute, 28 U.S.C. § 1331, as well as under the "Little Tucker Act," 28 U.S.C. § 1346(a)(2). As the appellants note, the FLSA allows suits to recover overtime liability against any public agency, including the United States or any federal agency, "in any Federal or State court of competent jurisdiction." 29 U.S.C. § 216(b). The FLSA per-

mits employees to sue on behalf of themselves and of other similarly situated employees, who may become party plaintiffs by issuing their written consent. 29 U.S.C. § 216(b).

Appellees, the government employers of plaintiffs, argue that the Little Tucker Act governs this action. That Act, 28 U.S.C. § 1346(a)(2), gives the district courts original jurisdiction, concurrent with that of the Claims Court, over non-tort statutory civil actions against the United States for claims which do not exceed $10,000 in amount. Appellees also contend, however, that the Little Tucker Act's venue provisions, 28 U.S.C. § 1402(a)(1), grants district courts jurisdiction only over the claims of *resident* plaintiffs.[1] Appellees thus moved that the district court transfer the claims of the non-resident plaintiffs to the United States Claims Court.

The district court agreed to transfer the claims of all non-resident plaintiffs to the Claims Court, pursuant to 28 U.S.C. § 1406(a). The court held that the Tucker Act's venue provision, rather than that of the federal question statute, "is applicable to this FLSA action because its jurisdictional basis is premised on Section 1346(a)(2)." The court concluded that the "plain meaning" of the phrase, "where the plaintiff resides," at least as used in the Little Tucker Act's venue provision, requires that all plaintiffs reside in the district where they bring their claim. The district court thus granted the appellees' motion to transfer "this action to the United States Claims Court pursuant to 28 U.S.C. § 1406(a)," as soon as the resident plaintiffs informed the court whether they wished to remain in the Northern District of Georgia, or accept transfer to the Claims Court with their fellow plaintiffs.

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[1] None of the individual claims involved herein exceeded $10,000 in amount. The district court therefore clearly had original jurisdiction over the claims of the resident plaintiffs under the Little Tucker Act.

In May, 1989, before it had actually transferred any claims, the district court granted the appellants' unopposed request for interlocutory certification of its order. The appellants then petitioned for permission to appeal from the transfer order. The government objected to the petition for permission to appeal, asserting that the United States Court of Appeals for the Federal Circuit, rather than this Circuit, had appellate jurisdiction over this matter. In July, 1989, this Court granted interlocutory review, pursuant to 28 U.S.C. § 1292(b).

Within days after oral argument on the interlocutory appeal, the Federal Circuit issued an *en banc* opinion in *Carter v. Gibbs*, 909 F.2d 1452 (Fed.Cir.1990), *cert. den.* —— U.S. ——, 111 S.Ct. 46, 112 L.Ed.2d 22 (1990), a case involving issues related to those before us today. In *Carter*, the Federal Circuit held that the Civil Service Reform Act deprived district courts of subject-matter jurisdiction over the FLSA claims of federal employees, at least when those employees are covered by collective bargaining agreements that permit them to grieve and arbitrate FLSA violations. This court therefore allowed both parties to address this issue by supplemental brief and by additional oral argument.

ISSUES

We must now determine whether we have jurisdiction to hear the appellants' challenge to the district court's order transferring this matter to the Claims Court. Appellants also urge us to consider whether the district court erred in its application and interpretation of the venue provision of the Little Tucker Act, 29 U.S.C. § 1402(a)(1). Appellees, finally, contend that we, like the Federal Circuit, should hold that the Civil Service Reform Act deprives district courts of jurisdiction to hear FLSA claims of federal employees covered by collective bargaining agreements.

DISCUSSION

Jurisdiction:

Today we consider the Little Tucker Act in tandem with the FLSA and 28 U.S.C. § 1331, the "federal question" statute, in order to resolve whether the latter provisions suffice by themselves to confer jurisdiction on the federal courts. In short, we must now resolve whether the Tucker Act provides the *sole* basis for a court to hear an FLSA claim against the federal government.

In *Zumerling v. Devine*, 769 F.2d 745 (Fed.Cir.1985), the Federal Circuit rejected the plaintiffs' claims that the district court had jurisdiction over their overtime claims pursuant to the FLSA. The court determined that, although the FLSA *defined* the plaintiffs' cause of action, the Tucker Act provided the court with jurisdiction to hear these claims against the federal government. Similarly, in *Graham v. Henegar*, 640 F.2d 732 (5th Cir. 1981), the Fifth Circuit determined that the Tucker Act alone provided it with jurisdiction to hear the plaintiffs' FLSA claims, even though the plaintiffs had asserted both 28 U.S.C. §§ 1331 and 1337 as independent jurisdictional grounds for their claims.

After the Fifth and Federal Circuits' decisions in *Zumerling* and *Graham*, however, the Supreme Court, at least ostensibly, rejected the notion of exclusive Tucker Act jurisdiction over claims against the government. In *Bowen v. Massachusetts*, 487 U.S. 879, 108 S.Ct. 2722, 101 L.Ed.2d 749 (1988), the Supreme Court appeared to dispel the notion of the Claims Court's exclusive jurisdiction over Little Tucker Act claims:

> It is often assumed that the Claims Court has exclusive jurisdiction of Tucker Act claims for more than $10,000. . . . That assumption is not based on any language in the Tucker Act granting such exclusive jurisdiction to the Claims Court. Rather, that Court's jurisdiction is "exclusive" only to the extent that Congress has not granted any other court authority

> to hear the claims that may be decided by the Claims Court.

Bowen v. Massachusetts, 108 S.Ct. at 2740, n. 48.

Despite this language, we conclude that *Bowen* does not overturn previous authority establishing the Tucker Act as the exclusive jurisdictional basis for FLSA claims against the government. In *Bowen*, the Supreme Court held that the federal district court, rather than the Claims Court, had jurisdiction to review a final order of the Secretary of HHS refusing to "reimburse" a state for a category of expenditures under the State's Medicaid program. In essence, the Court determined that the state did not have an adequate remedy in the Claims Court since its claim was not one for "money damages." Instead, the state sought declaratory and injunctive relief, together with payments for estimated future expenditures. As the Supreme Court noted, in such a case the Claims Court might prove an inadequate forum for review of a disallowance claim; the Claims Court does not have the equitable powers of a district court to grant prospective relief. *Bowen*, 108 S.Ct. at 2737-38.

It is clear that Congress enacted the Little Tucker Act as the primary vehicle for adjudicating monetary claims against the government. Through the Little Tucker Act, 28 U.S.C. § 1491, Congress conferred on the United States Claims Court:

> . . . jurisdiction to render judgment founded upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. . . .

As a rule, specific provisions controlling suits against the government should govern over general ones. *Brown v. General Services Administration*, 425 U.S. 820, 824, 96 S.Ct. 1961, 1963, 48 L.Ed.2d 402 (1976). In this case,

Congress has enacted the Little Tucker Act as the specific means of suing the government for monetary damages, and we agree with appellees that appellants' claims actually arise under that Act. As the district court of the District of Columbia has also concluded, the Little Tucker Act, rather than the FLSA, more easily accommodates the sort of allegations that the appellants present today:

> First . . . the FLSA does not vest jurisdiction in a particular court.
>
> * * * *
>
> Second, the legislative history of the FLSA amendments of 1966, which added the "any court of competent jurisdiction" language quoted above, indicates that the purpose for adding that language was not to supplant the Tucker Act, but rather to allow state and local employees to bring FLSA claims in federal court
>
> . . . .
>
> Third, the language of the Tucker Act is all-inclusive . . . Absent a specific Congressional grant of jurisdiction in a particular court . . . the Tucker Act applies to any claim brought against the United States.

Brooks v. Weinberger, 637 F.Supp. 22, 24 (D.D.C. 1986). We therefore hold, as the district court in *Brooks* also concluded, that "jurisdiction for claims to recover compensation for violations of the Fair Labor Standards Act rests in the federal courts by virtue of the Tucker Act." *Brooks*, 637 F.Supp. at 24.

As one of the regional appellate courts, we have the authority to determine the limits of our own jurisdiction:

> Well-established among the jurisdictional powers of all appellate courts is the inherent power to determine for themselves, within the bounds of the law-

> of-the-case doctrine, whether they have subject matter jurisdiction over an appeal before them.
>
> * * * *
>
> The existence, *vel non*, of jurisdiction is necessarily an integral part of every case, but that is not to say that only the court having such jurisdiction is anointed to declare the existence or absence of jurisdiction.

Smith v. Orr, 855 F.2d 1544, 1552, 1549 (Fed. Cir. 1988). Today we determine that we have no jurisdiction to hear the merits of an appeal based, as we have established, on allegations which derive solely from the Little Tucker Act.

Since we have resolved that the district court's jurisdiction over these claims derives solely from the Little Tucker Act, the Federal Circuit must hear this appeal. *See, e.g., United States v. Hohri*, 482 U.S. 64, 107 S.Ct. 2246, 2252, 96 L.Ed.2d 51 (1987) (Congress has established "exclusive Federal Circuit jurisdiction over *every appeal* from a Tucker Act or nontax Little Tucker Act claim.") (emphasis in original). We therefore transfer this appeal to the Federal Circuit. While it appears from its opinion in *Carter v. Gibbs*, 909 F.2d 1452 (Fed. Cir. 1990), *cert. den.* —— U.S. ——, 111 S.Ct. 46, 112 L.Ed.2d 22 (1990), that the Federal Circuit may have already determined the consequences of this appeal, that Circuit remains free to decide these issues, including the issue of venue, in the manner it deems appropriate.

CONCLUSION

For the foregoing reasons, we TRANSFER this appeal, and hereby direct the Clerk to forward certified copies of documents filed in this Court of Appeals, including the briefs, together with this Order and the record from the district court, to the Clerk of the United States Court of Appeals for the Federal Circuit.

TRANSFERRED.

THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 89-8540

LILLIE E. PARKER, *et al.*,
Plaintiffs-Appellants,

versus

GWENDOLYN KING, *et al.*,
Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of Georgia

ON PETITION(S) FOR REHEARING AND
SUGGESTION(S) OF REHEARING EN BANC

(Opinion July 12, 1991)

[Filed Nov. 12, 1991]

Before: EDMONSON, Circuit Judge and HILL* and HENDERSON, Senior Circuit Judges.

PER CURIAM:

(X) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ J. L. Edmondson
United States Circuit Judge

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* See Rule 34-2(b), Rules of the U.S. Court of Appeals for the Eleventh Circuit.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action File No. 87-CV-1691-JTC

LILLIE E. PARKER, *et al.*,
Plaintiffs,

v.

DORCAS R. HARDY, *et al.*,
Defendants.

ORDER OF COURT

[Filed Mar. 2, 1989]

This matter is before the court on defendants' motion to dismiss or alternatively to transfer this action to the United States Claims Court. For the following reasons, defendants' alternative motion to transfer is GRANTED.

I. STATEMENT OF THE CASE

Plaintiffs bring this action under the Fair Labor Standards Act, 29 U.S.C. § 201, *et seq.* (FLSA) and seek monetary relief on the grounds that the government defendants are failing to comply with the FLSA's overtime requirements. This case was originally filed by four employees of the Department of Health and Human Services, Social Security Administration (SSA), as Social Insurance Representatives. These original four employees reside in the Northern District of Georgia. The fifth named plaintiff, added by amendment, is employed by the SSA as a Social Insurance Claims Examiner and resides in Park Ridge, Illinois. Over one thousand plaintiffs filed consents to opt in as party plaintiffs pursuant to 29 U.S.C. § 216(b) of the FLSA.

Plaintiffs claim that payment of overtime as provided in the Federal Employment Pay Act (FEPA), which caps the amount of overtime pay to certain employees, violates the FLSA. The complaint invokes, as its jurisdictional basis, the Tucker Act, 28 U.S.C. § 1346(a)(2) and 28 U.S.C. § 1331

Defendants have brought a motion to dismiss or alternatively to transfer this action to the United States Claims Court on the grounds that (1) venue is improper in this court as to the plaintiffs who do not reside in this district; and (2) subject matter jurisdiction is lacking. Because this court finds that venue is lacking as to most of the plaintiffs, the court need not address the parties' arguments regarding jurisdiction.

II. VENUE IN THIS ACTION DOES NOT LIE IN THIS COURT

A. *Background*

In this FLSA action, venue is established by 28 U.S.C. § 1402(a)(1), the Tucker Act's venue provision. This provision states as follows:

> (a) Any civil action against the United States under subsection (a) of Section 1346 of this Title may be prosecuted only: (1) except as provided in Paragraph (2), in the judicial district where the plaintiff resides.

28 U.S.C. § 1402(a)(1). This venue provision is applicable to the present action because it is an action brought within § 1346(a)(2) of the Tucker Act. This jurisdictional provision provides:

> (a) The district courts shall have original jurisdiction, concurrent with the Court of Claims;
>
> > (2) Any civil action or claim against the United States, not exceeding ten thousand dollars an amount, founded either upon the Constitution

> or any act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. . . .

28 U.S.C. § 1346(a)(2). Accordingly, the Tucker Act's venue provision, 28 U.S.C. § 1402, is applicable to this FLSA action because its jurisdictional basis is premised on § 1346(a)(2).

The relevant portion of the Tucker Act's venue provision at issue in this case states that when a Tucker Act claim is brought in federal district court, venue is proper "in the judicial district where the plaintiff resides. . . ." 28 U.S.C. § 1402(a)(1).

Defendants maintain that the Tucker Act is the only venue statute applicable to this case. Defendants argue that this venue provision requires that all plaintiffs reside in the Northern District of Georgia for venue to be proper in this case. Defendants maintain that the plaintiffs' interpretation of § 1402(a)(1), that only one plaintiff reside in the district where the FLSA action is brought, would invite forum shopping and a multiplicity of suits since nonresident plaintiffs would still not be prohibited from litigating in their district. Defendants further argue that the venue provision of the Tucker Act is a narrow exception to the jurisdiction of the Claims Court and should be narrowly construed to afford district court venue only where all the plaintiffs reside if the action is not brought in the Claims Court.

Plaintiffs maintain that venue is proper under the Tucker Act where, as here, at least one plaintiff resides in the district. Plaintiffs maintain that the legislative history of the Tucker Act demonstrates a policy of facilitating claims against the government. Plaintiffs argue that this congressional objective of accommodating plaintiffs would be completely thwarted by the government's

narrow construction of § 1402(a)(1). Plaintiffs maintain that this court should follow case law interpreting 28 U.S.C. § 1391, the general venue provision, because this provision contains language similar to that of the Tucker Act's venue provision. This authority does not require all plaintiffs to reside in the district. Under 28 U.S.C. § 1391, only one plaintiff must reside in this district for venue to exist.

B. *The Tucker Act's Venue Provision is Controlling*

The Tucker Act's venue provision, 28 U.S.C. § 1402 (a)(1) controls any determination in this case. In FLSA actions of this nature, the Tucker Act's venue provision controls, not the general venue provision of 28 U.S.C. § 1391(e). *Davila v. Weinberger*, 600 F.Supp. 599, 600 (D.C.C. 1985) This conclusion is supported by the "axiom that specific venue provisions take precedence over general venue provisions." *Id., citing, Bruns, Nordeman & Co. v. National Bank & Trust Co.*, 394 F.2d 300 (2d Cir.), *cert. denied*, 393 U.S. (1968).

C. *The Tucker Act's Venue Provision Excludes Non-resident Plaintiffs*

In the present case, the plaintiffs argue that policy supports a finding that venue is appropriate in this court. The court, however, finds the plain meaning of the Tucker Act's venue provision, coupled with the strong federal interest in avoiding forum shopping to outweigh the policy concerns cited by plaintiffs.

Plaintiffs maintain that the legislative history of the Tucker Act demonstrates a policy of facilitating claims against the government. Plaintiffs argue that this congressional objective of accommodating plaintiffs would be completely thwarted by the government's narrow construction of § 1402(a)(1). Also, arguing against a narrow construction of 28 U.S.C. § 1402(a)(1) is Congress' recognition that honoring plaintiffs' choice of forum would

work no hardship on the government. The United States is "presumably equipped to defend equally and conveniently in any Federal judicial district." Sen. Rep. No. 1390, 88th Cong., 2d Sess. (1964), *reprinted in 1964 U.S. Code Cong. & Ad. News* 3254, 3255. Plaintiffs also cite case law and other authority allegedly supporting their conclusion that venue is proper in this court. *Palardy v. Horner*, Civil Action No. 87-2732 (D. Mass. Mar. 25, 1988); *Hormel v. United States*, 123 F.Supp. 806, 809 (S.D.N.Y. 1954); *Hormel v. United States*, 11 F.R.D. 376 (S.D.N.Y. 1951); 1 *Moore's Federal Practice* 0.144 [11] at 1523 (2d ed. 1986).

Plaintiffs also argue that this court should look to precedent interpreting 28 U.S.C. § 1391(e) in interpreting the Tucker Act's venue provision because the language of both provisions is similar. 28 U.S.C. § 1391 (e)(4) prescribes venue for certain civil actions against the government and contains similar statutory language used in 28 U.S.C. § 1402(a)(1) because it permits venue where "the plaintiff resides." 28 U.S.C. § 1391(e)(4). The plaintiffs argue that every court to interpret this language of § 1391(e)(4) has concluded that it does not require *all* the plaintiffs to reside in the forum, as long as one of the plaintiffs resides in the district. The reason for such construction is to make suits against government agencies more convenient for plaintiffs. *See e.g., Exxon Corporation v. FTC*, 588 F.2d 895, 898-899 (7th Cir. 1978). Plaintiffs maintain that the logic of the numerous decisions interpreting § 1391(e) applies to § 1402(a)(1) and dictates that this court should construe § 1402(a)(1) to afford venue in this case.

The court, however, finds the reasoning of recent precedent more persuasive than the above arguments. *See Brooks v. Weinberger*, 637 F.Supp. 22 (D.D.C. 1986); *Davila v. Weinberger*, 600 F. Supp. 599 (D.D.C. 1985). *See e.g., Kelley v. United States*, Civil Action No. 83-2294 (D.D.C. May 7, 1984); *Clark v. Marsh*, Civil Ac-

tion No. 83-1352 (D.D.C. Nov. 28, 1983). *Davila* and *Brooks* hold that when the jurisdictional and venue provisions of the Tucker Act are considered together, they demonstrate Congress' deliberate efforts to channel certain types of cases to the Claims Court, while allowing other claims to be heard concurrently by certain district courts. *Id.* In *Davila*, the court noted that prior to the passage of the Tucker Act, only claims against the United States founded upon an act of Congress, a regulation of the executive department, or an express or implied contract with the United States could be asserted, and could only be brought in the Claims Court. 600 F. Supp. at 604, n. 3, *citing*, 14 Wright, Miller & Cooper, Federal Practice and Procedure § 3657 at 213 (1976). Based upon this prior statute, the *Davila* court concluded that the venue provision of the Tucker Act was deliberately drafted to carve out a narrow exception to the jurisdiction of the Claims Court to eliminate a perceived hardship on the plaintiffs. *Id.* at 604. As such, the court narrowly construed the Tucker Act to afford venue only to the plaintiffs who reside in the district. *Id.*

This court also finds persuasive the reasoning of the *Davila* court that § 1402(a)(1) should not be construed in a manner consistent with § 1391(e)(4). "Because § 1391(e) also permits the action to be brought where a defendant in the action resides or where the cause of action arose, *see* 28 U.S.C. § 1391(e)(1) & (2), it clearly does not involve the same concerns over the respective jurisdiction of the Claims Court and the district courts as are embodied in the Tucker Act." *Id.*

Under 28 U.S.C. § 1406(a), a district court may transfer a case when venue is improper to any court in which it could have been brought if it would be "in the interest of justice" to do so. 28 U.S.C. § 1406(a). This court finds appropriate the transfer of this action to the Claims Court as to all nonresident plaintiffs, rather than the dismissal of this action.

Venue is still proper as to the plaintiffs who reside within this district. Therefore, this court must still consider whether jurisdiction is appropriate as to these plaintiffs. The parties have represented to the court that a case is currently on appeal in the Federal Circuit that would be dispositive of the jurisdictional issues in this case. *Carter v. Gibbs*, 690 F. Supp. 897 (C.D. Ca. 1988). Therefore, the court finds it appropriate to stay this action, pending the opinion of the Federal Circuit in *Carter v. Gibbs*. Alternatively, the resident plaintiffs may transfer their claims to the Claims Court along with the nonresident plaintiffs. In opposing defendants' motion, plaintiffs emphasized the concerns for judicial economy and the desirability of litigating all of their claims in the same forum. It would be in the interest of justice and judicial economy for all plaintiffs to present their claims in the Claims Court.

The resident plaintiffs are directed to notify this court of whether they desire to maintain this action in this court, subject to a stay of their action, or transfer their claims, along with those of the nonresident plaintiffs, to the Claims Court by March 17, 1989. If the resident plaintiffs seek to maintain this action in this court, the court will enter an order staying their action at this time. Plaintiffs' counsel is shall specify the identity of the resident plaintiffs seeking to maintain their claims in this court, subject to a stay of their action.

III. CONCLUSION

In sum, defendants' motion to dismiss or alternatively transfer is GRANTED as to the motion to transfer. The court will order the transfer of this action to the United States Claims Court pursuant to 28 U.S.C. § 1406(a) once the matter of the resident plaintiffs is determined. The clerk is DIRECTED TO RESUBMIT this matter on March 20, 1989 for a determination of whether the claims

of the resident plaintiffs shall be stayed or transferred to the Claims Court.

SO ORDERED, this 28 day of February, 1989.

/s/ Jack T. Camp
JACK T. CAMP
United States District Judge

Entered on Docket Mar. 3, 1989

STATUTORY PROVISIONS

28 U.S.C. 1295

(a) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction—

* * * *

(2) of an appeal from a final decision of a district court of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, the District Court of the Virgin Islands, or the District Court for the Northern Mariana Islands, if the jurisdiction of that court was based, in whole or in part, on section 1346 of this title, except that jurisdiction of an appeal in a case brought in a district court under section 1346 (a)(1), 1346(b), 1346(e), or 1346(f) of this title or under section 1346(a)(2) when the claim is founded upon an Act of Congress or a regulation of an executive department providing for internal revenue shall be governed by sections 1291, 1292, and 1294 of this title;

28 U.S.C. 1331

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. 1346

(a) The district courts shall have original jurisdiction, concurrent with the United States Claims Court, of:

* * * *

(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated

damages in cases not sounding in tort, except that the district courts shall not have jurisdiction of any civil action or claim against the United States founded upon any express or implied contract with the United States or for liquidated or unliquidated damages in cases not sounding in tort which are subject to sections 8(g)(1) and 10(a)(1) of the Contract Disputes Act of 1978. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

29 U.S.C. 216

* * * *

(b) Any employer who violates the provisions of section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of section 215(a)(3) of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages. An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.

The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 217 of this title in which (1) restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 206 or section 207 of this title by an employer liable therefor under the provisions of this subsection or (2) legal or equitable relief is sought as a result of alleged violations of section 215(a)(3) of this title.

INDIVIDUALS WHO FILED CONSENT FORMS WITH THE DISTRICT COURT

Jack Abbey
Daniel Abrams
Duncan Ackley
William B. Adams, Jr.
Vincent Agostine, Jr.
Rosa Agramonte
Bonnie H. Aguilar
Mary C. Aikin
Mark Akard
Margaret Akers
Dianne P. Akin
P. Alamed
Kenneth E. Allen
Ann M. Almoney
Delonia Alston
Lillian Amos
Charlotte Anderson
David Anderson
Jerleen Anderson
Michael Anderson
Alan Andich
Dianna Aranda
William Archer
Juan Arena
Lucy Arlotti
Mark Armentrout
Larry J. Armstrong
Anita Arnold
Mary Arnold
Judy Atkisson
Ruth A. Atnipp
Maureen Atwood
Mark Aulenbach
Karen Ausby
Mark Bacak
Nancy Bacak
George Baccash
Diana H. Bagley
Rosemarie Bainbridge
Glenda M. Bandy
Ora D. Baker
Alfredo Ballon
Donald Baloh
Eula M. Bannister
Leta M. Banther
George Barantseff
Kay Barker
Patricia A. Barlow
Amy Barnette
Joyce Barnette
Thomas Barrett
Jerome A. Barry
John Barsi
Cheryl A. Bastow
Rebecca Baucom
Renate Bayer
James D. Beasley
Corina Becker
Helen Becks
Barbara Behal
Gail Behnke
Lorraine E. Belanger
Erwin Beljan
Bobbie J. Bell
Carol D. Benitez
Sandra Bennett
Karen A. Bentz
Marie Berlongieri
Nancy Bernhard
Joseph F. Berry
Nancy Berryhill
Hilario Besa

Patricia Betch
Edward J. Bidek
Louise W. Billingsley
John Bills
Mary Billups
Amy Bilski
Sandra Black
James Blake
Robert Blanchette
Roseann Blando
David Boardman
Linda Boatright
James D. Bockenstette
Susan Boggess
Paul Bogumil
Robert V. Boise
Patricia Bolden
Cynthia Bonko
Sandra Bonser
Irene Booth
Earl Boschaert
Emma Boseman
Thomas Bouchard
Karen Boutte
Joyce Bowen
Katherine Bowling
Vickie L. Bowling
Sue Bowyer
Susan Boyle
Herma Bradley
Joan Bradley
L. Randy Bradley
John Brady
Frances Branch
Robert Branham
Wesley Brannon
Steven Braswell
Ronald J. Braut
Teresa Brawner
Gloria Brazier
Harvey Breiner
Meldred Brewer
Edgar Bridgewater
Barbara Brierly
Janis Brinley
Betty C. Brinson
Carole Brock
Linda Brogden
Deborah Brooks
Lois Broome
Donna C. Broussea
Carrie Brown
Edward L. Brown
Gwenda L. Brown
Herman V. Brown
Ruby H. Brown
Sybil Brown
William A. Brown
John J. Browne
Ruby Broxton
Doris Brude
Thomas Brudenell
Gretchen Brunett
Bettie J. Brunton
Gustie Brust
Cynthia A. Bryant
Deborah Buchholz
Michael Budig
Joyce Budzinski
Denis Buksa
Margaret Bunn
Beverly Burch
Barbara Burkhalter
Josephine B. Burleson
Dorothy J. Burns
Harolyn Burns

James F. Burns
Mazell Burns
Joyce Burnside
Mel Burres
David Busby
Lois J. Buskey
Preciliano Bustamante
Beverly Butler
Patricia A. Butts
Timothy Byrnes
Donald Caird
Eileen T. Calcutt
Sharon Caldwell
Edith Calhoun
Bruce Callander
Donald Calloway
Francis Campbell
Judith Campbell
W. D. Campbell
Ozelle Cannonier
James M. Canter
Stuart Carasik
Caprice Carattini
Deborah Cardin
Marvin Cardwell
Dominic J. Carignano
Faye N. Carles
Nancy Carlson
Terrence Carlson
Samuel Carpentieri
Mary Carr
William S. Carrie
Deborah Carryer
Brenda F. Carter
Jane C. Carter
Samuel B. Cartledge
Steven Carzasty
Kathleen Casey
Norma J. Casey
Peter Casey
Albert Castro
Thomas Catchpole
Hilda S. Cawley
Loretta Celi
G. James Cercone
Neva Chaffin
Roger W. Chandler
Valerie Chapin
William D. Charles
Dale B. Cherry
Sharon L. Chestnut
Allyn Chivers
Betsy Christopher
Betty Churchill
Audrey Clattenburg
Jeffrey A. Cleland
David Clemens
Martha Clement
Sheral A. Clemmens
Ester Cobb
Willie Cobb
Lavine Cobia
Warren W. Coble
Doris Cochran
Ruth Cody
Antoinette Colasante
Jerry Coleman
Gloriann Colon
Beverly Combs
Rebecca Commander
Iris Conkle
John Conklin
Margaret H. Conly
George Connors
Pauline Cook
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No. 91-1518

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In the Supreme Court of the United States

OCTOBER TERM, 1991

LILLIE E. PARKER, ET AL., PETITIONERS

v.

GWENDOLYN KING, COMMISSIONER, SOCIAL SECURITY ADMINISTRATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the United States Court of Appeals for the Federal Circuit has exclusive appellate jurisdiction under 28 U.S.C. 1292(c)(1) and 28 U.S.C. 1295(a)(2) over an interlocutory appeal in a suit for overtime pay and damages brought by federal employees against the United States under Section 16(b) of the Fair Labor Standards Act of 1938, 29 U.S.C. 216(b), on the ground that the Little Tucker Act, 28 U.S.C. 1346(a)(2), provides the basis for jurisdiction in the district court.

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In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-1518

LILLIE E. PARKER, ET AL., PETITIONERS

v.

GWENDOLYN KING, COMMISSIONER, SOCIAL SECURITY ADMINISTRATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals, Pet. App. 1a-8a, is reported at 935 F.2d 1174. The opinion of the district court, Pet. App. 10a-17a, is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 12, 1991. A petition for rehearing was denied on November 12, 1991. On January 23, 1992, Justice Kennedy extended the time for filing a petition for a writ of certiorari to and including March 23, 1992, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners[1] filed this suit in the United States District Court for the Northern District of Georgia in 1987, seeking overtime pay and liquidated damages for alleged violations of the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 201 *et seq.* Pet. App. 2a. None of their individual claims exceeded $10,000. Pet. App. 3a n.1. The complaint asserted jurisdiction pursuant to the so-called Little Tucker Act, 28 U.S.C. 1346(a)(2),[2] and 28 U.S.C. 1331. Pet. App. 2a, 11a. Respondents moved to dismiss, or in the alternative, to transfer the action to the United States Claims Court on two grounds: (1) venue was improper as to those petitioners who did not reside within the Northern District of Georgia, and (2) the Civil Service Reform Act of 1978, 5 U.S.C. 7121, deprived the district court of subject matter jurisdiction over the claims of all petitioners. Pet. App. 11a.

The district court held that the Tucker Act's venue provision, 28 U.S.C. 1402(a)(1), controlled the venue issue and that this provision afforded venue only to

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[1] Petitioners are the four employees of the Social Security Administration who filed the suit, on behalf of themselves and other similarly situated employees; a fifth named employee who joined the suit by amended complaint; and approximately 1300 others from across the country who filed consents to opt in as party plaintiffs pursuant to 29 U.S.C. 216(b). Pet. App. 2a.

[2] Under the Tucker Act, the Claims Court has exclusive jurisdiction over claims against the United States for more than $10,000 "founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort." 28 U.S.C. 1491. Under 28 U.S.C. 1346(a)(2) (the Little Tucker Act), district courts have concurrent jurisdiction with the Claims Court over such claims when the amount sought is less than $10,000.

the plaintiffs who reside in the district. Pet. App. 13a, 15a. Relying on 28 U.S.C. 1406(a), the district court decided to transfer the claims of the nonresident plaintiffs to the Claims Court. Pet. App. 15a. The district court then considered whether it had jurisdiction over the resident plaintiffs' claims. Based on the parties' representations that *Carter* v. *Gibbs*, a case then on appeal to the United States Court of Appeals for the Federal Circuit, would be dispositive of the jurisdictional issues presented, the district court stayed the case pending the Federal Circuit's decision. Pet. App. 16a.[3] Thereafter, before transferring any claims, the district court granted petitioners' unopposed request for interlocutory certification of the court's venue order. Pet. App. 4a. Over respondents' objection,[4] the Eleventh Circuit granted interlocutory review pursuant to 28 U.S.C. 1292(b). Pet. App. 4a.

2. Within days of the oral argument in the interlocutory appeal, the Federal Circuit issued its en banc decision in *Carter* v. *Gibbs*, 909 F.2d 1452, cert. denied, 111 S. Ct. 46 (1990), which held that the Civil Service Reform Act deprived district courts of subject-matter jurisdiction over the FLSA claims of federal employees, at least when those employees are covered by collective bargaining agreements that permit them to grieve and arbitrate FLSA violations. Pet. App. 4a.

After allowing supplemental briefing and additional oral argument, the Eleventh Circuit issued an opinion

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[3] The court did, however, give resident plaintiffs the option of transferring their claims to the Claims Court. Pet. App. 16a.

[4] Respondents argued that the Federal Circuit would have appellate jurisdiction of the matter under 28 U.S.C. 1292(c)(1) and 28 U.S.C. 1295(a)(2).

directing that the appeal be transferred to the Federal Circuit because the district court's jurisdiction rested on the Little Tucker Act.[5] Pet. App. 8a. The Eleventh Circuit concluded that *Bowen* v. *Massachusetts*, 487 U.S. 879 (1988), did not overturn prior authority establishing the Tucker Act as the exclusive jurisdictional basis for FLSA claims against the government. Pet. App. 6a. Accordingly, "[s]ince we have resolved that the district court's jurisdiction over these claims derives solely from the Little Tucker Act, the Federal Circuit must hear this appeal." Pet. App. 8a. Although the Eleventh Circuit acknowledged that in light of *Carter*, "the Federal Circuit may have already determined the consequences of this appeal," it recognized that "that Circuit remains free to decide these issues, including the issue of venue, in the manner it deems appropriate." Pet. App. 8a.

ARGUMENT

1. The present posture of this case makes review at this time inappropriate, for several reasons. First, there is no reason for this Court to vary from its "normal practice of denying interlocutory review," see *Estelle* v. *Gamble*, 429 U.S. 97, 114 (1976) (Stevens, J., dissenting), in this peculiar case. Presently, this case is doubly interlocutory: the Court is being asked to review an interlocutory transfer order of an interlocutory venue appeal. Transfer orders are almost universally viewed as interlocutory. See *Persyn* v. *United States*, 935 F.2d 69, 72-73 (5th Cir. 1991);

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[5] Under 28 U.S.C. 1295(a)(2), the Federal Circuit has exclusive appellate jurisdiction if the jurisdiction of the district court was based "in whole or in part" on the Little Tucker Act. According to 28 U.S.C. 1292(c)(1), interlocutory appeals in such cases must also be taken to the Federal Circuit.

Alimenta (USA), Inc. v. *Lyng*, 872 F.2d 382, 384-385 (11th Cir. 1989); *Raines* v. *Block*, 798 F.2d 377, 379 (10th Cir. 1986). The Eleventh Circuit's transfer order neither conclusively determines the jurisdictional issue nor is effectively unreviewable at a later time. See *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 468 (1978). The Federal Circuit may review the transfer order, and if that court finds the transfer to have been "clearly wrong," it may decline to accept jurisdiction. *Christianson* v. *Colt Industries Operating Corp.*, 486 U.S. 800, 817 (1988). In any event, the jurisdictional question will still be available for review by this Court after the entry of a final judgment. *Id.* at 817-818.[6]

Second, the case is potentially moot as to some—and perhaps all—of the petitioners. While this litigation was pending, the American Federation of Government Employees (AFGE) and the Social Security Administration of the Department of Health and Human Services went to arbitration over grievances filed by the union on behalf of Claims Examiners/Representatives, GS-105-9 and 10, and Claims Authorizers, GS-933-9 and 10, to protest the agency's decision to exempt those employees from coverage under the FLSA. The arbitrator ruled that the agency had illegally designated the grievants as exempt from coverage under the FLSA as bona fide

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[6] Moreover, there has been no appellate ruling on the venue issue, which is the question that gave rise to the interlocutory appeal. The Eleventh Circuit's transfer order expressly leaves that issue open, stating that the Federal Circuit "remains free to decide these issues, including the issue of venue, in the manner it deems appropriate." Pet. App. 8a. Although the Eleventh Circuit accepted the discretionary interlocutory appeal under 28 U.S.C. 1292(b), there is no assurance that the Federal Circuit will agree to hear the venue issue.

administrative employees and ordered the agency to treat the grievants as nonexempt from FLSA coverage and to pay them backpay for overtime pay to which they were entitled. The agency filed objections to the arbitrator's decision, which the Federal Labor Relations Authority denied in a decision dated April 14, 1992. See *U.S. Department of Health and Human Services, Social Security Administration, Baltimore, Maryland and American Federation of Government Employees*, 44 F.L.R.A. No. 66 (Apr. 14, 1992). Accordingly, as to those class members who are members of the AFGE bargaining unit and who participated in the grievance arbitration, the case would appear to be moot. Should the agency decide to extend the decision to the class members who are not covered by any collective bargaining agreement or who are covered by an agreement with another union, the case could then be moot as to those class members as well. The obvious potential for having this case become moot counsels strongly against this Court granting certiorari at this interlocutory stage.

2. The transfer order is correct. Petitioners brought suit seeking overtime pay and liquidated damages; they specifically pled the Little Tucker Act, 28 U.S.C. 1346(a)(2), as one of the bases for jurisdiction in the district court; and the district court's venue ruling was clearly premised on Tucker Act jurisdiction. Pet. App. 12a. Accordingly, the Federal Circuit would have exclusive jurisdiction over any interlocutory (or final) appeal taken in this case. 28 U.S.C. 1292(c)(1); 28 U.S.C. 1295(a)(2); *United States* v. *Hohri*, 482 U.S. 64 (1987). The Eleventh Circuit's decision to transfer the appeal to the Federal Circuit was therefore proper.

3. There is no conflict among the circuits on the question presented. The Eleventh Circuit's refusal

to find that the FLSA and 28 U.S.C. 1331 provided an alternative basis for district court jurisdiction over whatever claims for judicial relief petitioners might have, is consistent with the decisions of the other courts of appeals that have considered this question under the FLSA. See *Zumerling* v. *Devine*, 769 F.2d 745 (Fed. Cir. 1985); *Graham* v. *Henegar*, 640 F.2d 732 (5th Cir. 1981).

Contrary to petitioners' claim, Pet. 7, the Eleventh Circuit's decision is not inconsistent with *Bowen* v. *Massachusetts*, 487 U.S. 879 (1988). In *Bowen*, this Court held that the district courts, not the Claims Court, have jurisdiction to review a final order denying a claim for reimbursement under the Medicaid program. In so ruling, the Court observed in a footnote that the Claims Court's jurisdiction under the Tucker Act is exclusive "only to the extent that Congress has not granted any other court authority to hear the claims that may be decided by the Claims Court." 487 U.S. at 910 n.48. The Eleventh Circuit explicitly acknowledged that aspect of *Bowen*, Pet. App. 5a-6a, but nevertheless concluded that the grant of subject matter jurisdiction in the FLSA must be read together with the Tucker Act. That ruling does not conflict with this Court's holding in *Bowen*.

The Eleventh Circuit was correct in noting that the Tucker Act is the more specific statute in this case, even though petitioners term it a "catch-all," Pet. 6, statute for damages claims against the government. The FLSA does provide a cause of action for a covered federal employee to sue his federal employer, but only in a court of "competent" jurisdiction. 29 U.S.C. 216(b).[7] For private employees

[7] Section 216(b) of Title 29 provides in pertinent part that "[a]n action to recover the liability prescribed in either of the

and state or local employees, who are also given a cause of action under that statute, there is only one federal court of competent jurisdiction in which they may sue their employer: the district court. But when the federal government is sued for backpay and damages, the federal court of competent jurisdiction can only be one exercising Tucker Act jurisdiction (*i.e.*, the Claims Court and, for claims less than $10,000, the district courts) because those claims are cognizable only under that scheme unless another statute has directed them elsewhere. *Mitchell* v. *United States*, 930 F.2d 893 (Fed. Cir. 1991).

Petitioners have identified no case holding that FLSA claims are cognizable against the government in district courts under any statute other than the Little Tucker Act. Nonetheless, petitioners argue that the transfer order in this case conflicts with the decisions of other courts of appeals interpreting the sue-and-be-sued clause in the National Housing Act, 12 U.S.C. 1702. Pet. 8-11.[8] That argument overlooks

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preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated."

[8] The majority of petitioners' cases involve 12 U.S.C. 1702. Some of the cases cited by petitioners, however, involve other statutes, including 16 U.S.C. 839f(e)(5) and 15 U.S.C. 634(b)(1). Those statutes, while not identical to 12 U.S.C. 1702, are plainly dissimilar to the statute at issue here. For instance, 16 U.S.C. 839f(e)(5) provides in part that "[s]uits to challenge the constitutionality of this chapter, or any action thereunder, final actions and decisions taken pursuant to this chapter by the Administrator * * * shall be filed in the United States court of appeals for the region." 15 U.S.C. 634(b)(1) provides in pertinent part that "the Administrator may (1) sue and be sued in any court of record of a State having general jurisdiction, or in

fundamental differences between 12 U.S.C. 1702 and 29 U.S.C. 216(b).

The former is a classic sue-and-be-sued clause. It provides in part that the Secretary of Housing and Urban Development may "sue and be sued in any court of competent jurisdiction, State or Federal." While that language is similar to that of Section 216(b), there is a key difference. The purpose of a sue-and-be-sued clause is to authorize suit against a particular agency with regard to its commercial activities. Any recovery is from funds that are in that agency's control, which are separate from the funds in the general treasury. *Federal Housing Administration* v. *Burr*, 309 U.S. 242, 245 (1940); *Far West Federal Bank, S.B.* v. *Director, Office of Thrift Supervision*, 930 F.2d 883, 888-890 (Fed. Cir. 1991). See, *e.g.*, *C.H. Sanders Co.* v. *BHAP Housing Dev. Fund Co.*, 903 F.2d 114, 118-120 (2d Cir. 1990); *Industrial Indem., Inc.* v. *Landrieu*, 615 F.2d 644, 646-647 (5th Cir. 1980). When the claim, instead, is one that would be paid from appropriated funds, the Tucker Act controls the question of jurisdiction, despite the presence of a "sue-and-be-sued" clause. *Marcus Garvey Square, Inc.* v. *Winston Burnett Construction Co.*, 595 F.2d 1126, 1131-1132 (9th Cir. 1979) (Tucker Act provides jurisdiction despite sue-and-be-sued clause because there were no severed funds from which payment could be made); see *Cosme Nieves* v. *Deshler*, 786 F.2d 445, 447-450 (1st Cir.), cert. denied, 479 U.S. 824 (1986) (FLSA claim against a so-called non-appropriated fund instrumentality of the federal government may be maintained in district court,

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any United States district court, and jurisdiction is conferred upon such district court without regard to the amount in controversy."

since, unlike the situation in this case, no funds from the treasury would be reached by the judgment).[9]

4. Finally, there is no merit to petitioners' suggestion, Pet. 12, that the Court should grant review in this case because the Federal Circuit's en banc decision in *Carter* v. *Gibbs*, *supra*, undermines the FLSA's enforcement scheme and conflicts with *Barrentine* v. *Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1981). As we explained in our brief in opposition in that case (a copy has been provided to petitioners' counsel), the federal Circuit's decision in *Carter* v. *Gibbs* was correct. This Court therefore properly declined to review it. Nothing has changed since then that warrants any different treatment of this petition.[10]

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[9] We recognize that a pending case, *American National Red Cross* v. *S.G & A.E.*, No. 91-594 (argued Mar. 3, 1992), presents the question whether 36 U.S.C. 2, which provides that the American National Red Cross shall have the "power to sue and be sued in courts of law and equity, State or Federal," vests the federal courts with original jurisdiction over actions to which the American National Red Cross is a party. Yet, there is no need to hold this case pending the Court's decision in *American National Red Cross*. If this Court's decision in *Red Cross* proves informative on the questions presented in this case, the Federal Circuit will have the opportunity to consider it.

[10] Even if the Court were inclined to revisit the issue presented in *Carter* v. *Gibbs*, however, this case does not now present the proper vehicle for doing so. Neither court below ruled on the issue whether petitioners' claims are barred by *Carter* v. *Gibbs*. As noted above, the district court stayed its decision on the dismissal motion concerning the resident plaintiffs pending the Federal Circuit's decision in *Carter* v. *Gibbs*, and that stay has never been lifted. Furthermore, although the Eleventh Circuit requested supplemental briefing and oral argument on the *Carter* v. *Gibbs* issue, its order does not address the issue.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1992

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Petitioners,

v.

GWENDOLYN KING, Commissioner of the Social Security Administration, LOUIS SULLIVAN, Secretary, Department of Health and Human Services, and the UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States Court of Appeal for the Eleventh Circuit

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IN THE

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LILLIE E. PARKER, *et al.*, and SIMILARLY SITUATED UNNAMED PLAINTIFFS,

Petitioners,

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GWENDOLYN KING, Commissioner of the Social Security Administration, LOUIS SULLIVAN, Secretary, Department of Health and Human Services, and the UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States Court of Appeal for the Eleventh Circuit

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PETITIONERS' REPLY BRIEF

Petitioners maintain that section 16(b) of the Fair Labor Standards Act (29 U.S.C. 216(b)), *in conjunction with* section 1331 of Title 28, provides a basis for district court jurisdiction over their pay claims independent of the Tucker Act. Hence, we challenge the court of appeals' ruling that the Tucker Act provides the sole jurisdictional basis for FLSA claims against the federal government. In short, we contend that, contrary to the lower court's decision, the Federal Circuit does not have exclusive jurisdiction over petitioners' appeal under 28 U.S.C. 1295(a), and that the Eleventh Circuit possessed appellate jurisdiction over petitioners' claims.

As we have shown (Pet. 4-7), the court of appeals' conclusion conflicts with this Court's clear instruction in *Bowen v. Massachusetts*, 487 U.S. 879, 910, n.48 (1988), that Tucker Act jurisdiction is "exclusive," "only to the extent that Congress has not granted any other court authority to hear claims that may be decided by the Claims Court." Moreover, as we further demonstrated (Pet. 8-11), the court of appeals' decision is in square conflict with decisions of the Second, Eighth, and D.C. Circuits, holding that jurisdiction independent of the Tucker Act is conferred by jurisdictional statutes, such as 28 U.S.C. 1331, where another statute, such as section 16(b) of the FLSA, waives the sovereign immunity of the United States. Given the deep and growing division among the lower courts on the issue presented by petitioners, the need for guidance from this Court is acute.

1. The government does not, and of course cannot, contest that *Bowen* teaches that Tucker Act jurisdiction is in no way "exclusive" where Congress has granted another court authority to hear claims that may also be decided by the Claims Court. Although it appears to abandon significant elements of the reasoning of the court below, the government maintains that the court of appeals' ruling can be reconciled with *Bowen*.

The government acknowledges that section 16(b) of the FLSA provides a waiver of immunity for overtime claims against the federal government in courts of "competent" jurisdiction. The government urges, however, that the Eleventh Circuit's decision is correct on the grounds that when the federal government is sued for backpay and damages, a federal court of "competent" jurisdiction must be exercising Tucker Act jurisdiction because such claims "are cognizable only under that scheme unless another statute has directed them elsewhere." Op. Cert. 8.

The government's asserted rationale in defense of the lower court's ruling is highly conclusory and circular in

the extreme. It completely begs the question to which *Bowen* requires an answer—namely, whether Congress has provided "any other court authority" (487 U.S. at 910, n.48) to hear petitioners' claims. In failing to come to grips with this question, the government ignores the plain language of 28 U.S.C. 1331. Section 1331 establishes that U.S. district courts *are* courts of "competent" jurisdiction to hear FLSA claims, by giving them original jurisdiction over claims that arise under the laws of the United States. Specifically, section 1331 expressly and unqualifiedly provides that the district courts "shall" have jurisdiction over "*all* civil actions arising under the . . . laws . . . of the United States." *Id.* (emphasis added). When section 1331 is read in combination with 29 U.S.C. 216(b)'s waiver of sovereign immunity, it is manifest that Congress has vested federal district courts with "authority to hear [petitioners']claims" against the government for backpay—authority that is in no way contingent upon the Tucker Act. 487 U.S. at 910, n.48.[1]

The government's cryptic reliance on *Mitchell v. United States*, 930 F.2d 893 (Fed. Cir. 1991), raises more questions than it answers about the government's jurisdictional position. *Mitchell* addressed whether the Adminis-

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[1] Though not entirely clear, the government appears to insinuate that because petitioners pled the Little Tucker Act as one of the bases of jurisdiction in the district court, their action was somehow transformed into a Tucker Act case. Op. Cert. 6. Of course, petitioners' complaint merely listed alternative bases of jurisdiction; doing so was in no way inconsistent with their position that 28 U.S.C. 1331, in combination with 29 U.S.C. 216(b), provided an independent, alternative basis of district court jurisdiction over their claims.

Moreover, contrary to the government's suggestion, petitioners never represented to the district court that the Federal Circuit's resolution of the then pending *Carter v. Gibbs*, 909 F.2d 1452 (Fed. Cir. 1990), would be "dispositive" (Op. Cert. 3) of any aspect of their action. Indeed, petitioners believed that the district court would not be bound by the Federal Circuit's decision in *Carter*; hence, they specifically argued to the district court that it possessed jurisdiction, independent of the Tucker Act, to hear their claims.

trative Procedure Act waived sovereign immunity with respect to a separated Air Force officer's claim for back-pay. The court concluded that, under 5 U.S.C. 704, the APA's limited waiver of sovereign immunity could not be invoked by the plaintiff because he had an adequate remedy in the Claims Court.

This case, of course, has nothing to do with the APA's limited waiver of sovereign immunity. The source of the waiver of sovereign immunity here is in the Fair Labor Standards Act. *Mitchell* simply does not address whether 28 U.S.C. 1331, in conjunction with an unconditional waiver of sovereign immunity such as that stated in 29 U.S.C. 216(b), provides a district court with subject matter jurisdiction independent of the Tucker Act.[2]

2. As we have established, the decision of the court below is in square conflict with holdings of the Second, Eighth, and D.C. Circuits that jurisdiction independent of the Tucker Act is conferred by jurisdictional statutes, such as 28 U.S.C. 1331, where another statute, such as 29 U.S.C. 216(b), waives the sovereign immunity of the federal government. *See C.H. Sanders Co. v. BHAP Housing Dev. Fund. Co.*, 903 F.2d 114, 119 (2nd Cir. 1990); *Trans-Bay Engineers & Builders, Inc. v. Hills*, 551 F.2d 370, 376-77 (D.C. Cir. 1976) and *Bor-Son Building Corporation v. Heller*, 572 F.2d 174, 181-82 (8th Cir. 1978). Indeed, the D.C. Circuit has explicitly acknowledged the divergent courts of appeals' rulings on the issue of whether 28 U.S.C. 1331, in conjunction with a separate waiver of sovereign immunity, provides a district court with jurisdiction independent of the Tucker

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[2] If anything, *Mitchell* only underscores the growing controversy among the circuit courts as to whether, under *Bowen*, claims for back pay are to be defined as equitable in nature; if they are to be so categorized, a serious question exists as to whether the Claims Court possesses Tucker Act jurisdiction over them *at all*. *See Hubbard v. Environmental Protection Agency*, 949 F.2d 453 (D.C. Cir. 1991); *Ulmet v. United States*, 888 F.2d 1028 (4th Cir. 1989); and *Bowen v. Massachusetts*, 487 U.S. 879, 913-921 (1988) (Scalia, J., dissenting).

Act. *Spectrum Leasing v. United States*, 764 F.2d 891, 895, n.8 (D.C. Cir. 1985).

a. The government claims that the issue presented by the instant case is "fundamentally" different from that addressed in *C.H. Sanders*, *Trans-Bay*, and *Bor-Son* because those cases involved a "classic" sue-and-be-sued clause. Op. Cert. 8-9. The government's tack is totally unavailing. The salient point of those cases is never met by the government's argument. To reiterate, each circuit held that jurisdiction independent of the Tucker Act is conferred by jurisdictional statutes, such as 28 U.S.C. 1331, where another statute, such as section 16(b) of the FLSA, waives sovereign immunity.[3]

That the waiver of sovereign immunity was in the form of a sue-and-be-sued clause had nothing to do with

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[3] To the extent the government is suggesting that we argue that 29 U.S.C. 216(b) by *itself* confers district court jurisdiction, it is in error. As we have stressed, district courts have jurisdiction, independent of the Tucker Act, over claims such as petitioners by virtue of 29 U.S.C. 216(b) in conjunction with 28 U.S.C. 1331.

We do not mean to imply, however, that a jurisdictional argument relying on section 216(b) alone is not meritorious. The language of section 16(b) is highly analogous to 12 U.S.C. 1702, which provides that the Secretary of Housing and Urban Development may be sued "in any court of competent jurisdiction, State or Federal." The Fourth Circuit has held that section 1702 itself confers subject matter jurisdiction in federal district courts. *See* Pet. 9, n.7. The Solicitor General has advised this Court of his agreement with this view. Brief for Respondents in Opposition, at 9, *Portsmouth Redevelopment and Housing Authority v. Pierce*, No. 83-90.

Moreover, as the Solicitor General's opposition brief in the instant case points out, this Court is currently considering whether 36 U.S.C. 2, which is also analogous to 29 U.S.C. 216(b), vests federal district courts with original jurisdiction over actions to which the American National Red Cross is a party. *American National Red Cross v. S.G. & A.E.*, No. 91-594. A decision holding that provision does provide jurisdiction would strongly indicate that 29 U.S.C. 216(b), by itself, is also jurisdictional in nature. Accordingly, and contrary to the government's suggestion, it would seem appropriate to hold this case pending resolution of *American National Red Cross*.

the rulings of the Second, Eighth and D.C. Circuits, on which we rely. As the Second Circuit succinctly explained, "an action . . . may be commenced under section 1331 in the district court provided there is an independent waiver of sovereign immunity outside the Tucker Act." *C.H. Sanders Co.*, 903 F.2d at 119. That is precisely the situation presented by the instant case.[4]

b. Further inapposite is the government's assertion that any money claim that requires payment from the general treasury necessarily requires reliance on the Tucker Act. This contention completely ignores the plain language of the FLSA, which expressly authorizes court actions against any "public agency," a term defined in section 3(x) as including "the Government of the United States," as well as any federal agency. 29 U.S.C. 203(x), 203(e)(2)(A), 216(b).

The government's reliance on the First Circuit's decision in *Cosme Nieves v. Deshler*, 786 F.2d 445 (1st Cir. 1986) *cert. denied*, 479 U.S. 824 (1986) is misplaced. That case antedated this Court's *Bowen* decision, and wrongly assumed, in dicta, that the Tucker Act provides the exclusive basis of jurisdiction for all claims against the United States for more than $10,000. Indeed, if anything, *Cosme Nieves* aids petitioners. The First Circuit expressly recognized that the FLSA waives the sovereign immunity of the United States and federal agencies.

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[4] Nor can the government defend the lower court's ruling on the grounds that the Tucker Act is somehow "more specific" (Op. Cert. 7) with respect to petitioners' claims. In contrast to the Tucker Act, the FLSA provides a specific waiver of sovereign immunity for overtime claims against the United States or any federal agency. 29 U.S.C. 216(b), 203(e)(2)(A), 203(x). And, as shown, 28 U.S.C. 1331 specifically confers jurisdiction on federal district courts for *all* civil actions arising under federal laws. *See also Miller, Wright, Cooper, Federal Practice and Procedure*, Jurisdiction 2d, section 3657 (1985) (footnote omitted) (describing Tucker Act as "general in character").

786 F.2d at 449-450. *See* 29 U.S.C. 216(b), 203(x), 203(e)(2)(A)(ii). As *Bowen* made clear, with such a waiver, and an independent basis of jurisdiction, resort to the Tucker Act is unnecessary. 487 U.S. at 910, n.48.[5]

3. The government unconvincingly maintains that, for two reasons, the posture of this case would make review inappropriate at this time.

First, the government urges that review should be denied because the court of appeals' decision to transfer this case to the Federal Circuit is interlocutory in posture. This Court regularly grants review, however, in civil cases that are interlocutory in nature when the question presented is jurisdictional. *See e.g., FSLIC v. Tictin*, 490 U.S. 82 (1989); *Bowen v. Massachusetts, supra*, *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949); *Land v. Dollar*, 330 U.S. 731 (1947).

More important, the government fails to acknowledge that, in view of the *en banc* ruling in *Carter v. Gibbs*, 909 F.2d 1452 (Fed. Cir. 1990), *cert. denied*, 111 S.Ct. 46 (1990), the Eleventh Circuit's ruling is the functional equivalent of dismissal of petitioners' claims. In *Carter*, the Federal Circuit held that where, as here, federal em-

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[5] The government's reliance on such cases as *Marcus Garvey Square, Inc. v. Winston Burnett Construction Co.*, 595 F.2d 1126 (9th Cir. 1979) is misplaced. The issue in *Garvey* was whether the district court had jurisdiction over a contract action for money damages in excess of $10,000 against the Secretary of Housing and Urban Development. Far from holding that the Tucker Act "controls" (Op. Cert. 9) whenever a claim must be paid from the general treasury, that decision expressly declined to decide whether the Tucker Act was an exclusive grant of jurisdiction. *Id.*, at 1132. The court determined that the real party in interest in *Garvey* was the United States, not the Secretary. The court concluded that the Tucker Act provided jurisdiction there because only its waiver of sovereign immunity applied to the particular "facts of this case." *Id.* As noted, the waiver of sovereign immunity provided by the FLSA is extremely broad and authorizes suit against the United States or any federal agency. 29 U.S.C. 216(b), 203(x).

ployees are covered by collective bargaining agreements that permit them to grieve FLSA claims, *no* court has subject matter jurisdiction over such claims. As the Eleventh Circuit itself acknowledged, its decision to dispatch petitioners to the Federal Circuit seals the fate of their appeal in view of the Federal Circuit's ruling in *Carter*. Pet. App. 8a.

Second, the government argues that this case may be moot. In support of this contention, the government maintains that many of the petitioners are covered by a collective bargaining arbitration decision holding that the Social Security Administration had illegally exempted them from the FLSA. Op. Cert. 5-6. The government's mootness contention is wholly without merit.

As an initial matter, we point out that a substantial number of petitioners are represented by the National Federation of Federal Employees and are not covered by the pending arbitration proceeding cited by the government. Whether the Social Security Administration will extend the potential benefits of that proceeding to those petitioners is highly conjectural.

Moreover, it is important to underscore that the collective bargaining proceeding noted by the government is still ongoing; the Federal Labor Relations Authority remanded the matter to the arbitrator who has yet to decide important remedial questions, such as the amount of backpay, whether liquidated damages are owing, and what statute of limitations applies. *U.S. Department of Health and Human Services, Social Security Administration, Baltimore, Maryland and American Federation of Government Employees*, 44 F.L.R.A. No. 66, at 28 (April 14, 1992). Hence, a final resolution of that arbitration would not seem to be imminent.

With respect to the still pending remedial questions at issue in that arbitration, it is also important to emphasize that the federal government takes the position that arbitrators, unlike courts, are not empowered by the

FLSA to award liquidated damages or attorneys' fees under that statute. Given this position, the government's suggestion that this case is somehow moot is curious. As this Court stressed in *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 750 n.16 (1981), the remedies of liquidated damages and fees are important incentives to individual prosecution of the FLSA and, therefore, key to promoting its public policies. In short, in light of the government's view of the limited remedies available in an arbitration of federal employee FLSA claims, this litigation is critical to vindicating the policies of the FLSA, and to insuring that all the petitioners get the full relief to which they are entitled under that Act.

5. Finally, rather than minimizing the significance of this case, the government's brief in opposition only highlights its critical importance. The government's unsuccessful attempt to refute our contention that the lower court's ruling is flatly at odds with this Court's *Bowen* decision, and conflicts with the holdings of several courts of appeals, signals that, without guidance from this Court, the jurisdictional issue petitioners pose will only continue to be litigated. The lower court rulings in the instant case illustrate that confusion will continue to grow, not only with respect to what appellate court may hear cases of this nature, but also with regard to whether jurisdiction and venue is proper in federal district court or the United States Claims Court. As Justice Scalia has observed, "[n]othing is more wasteful than litigation about where to litigate." *Bowen v. Massachusetts*, 487 U.S. at 930 (dissenting opinion).

Moreover, as the government acknowledges, the issue raised here has an undeniable impact on enforcement of the Fair Labor Standards Act. As we have discussed (Pet. 11-12), if the Federal Circuit possesses exclusive jurisdiction over cases such as this one, it will mean, given that court's ruling in *Carter*, *supra*, that hundreds

of thousands of federal workers will be unable to judicially enforce their FLSA claims. They will instead be channelled to a union-controlled grievance-arbitration procedure that, according to the government's position, is not designed to ensure them the full array of remedies guaranteed by the FLSA. Such a result will seriously undermine enforcement of the FLSA in the federal workplace.[6]

In view of the foregoing, this Court's review is imperative.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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[6] The petition for a writ of certiorari submitted in *Carter v. Gibbs*, No. 89-1675, fully discusses why the Federal Circuit's decision seriously undermines enforcement of the FLSA. Though the government argues otherwise (Op. Cert. 10, n.10), this Court's revisiting of the issue presented in *Carter v. Gibbs* would not be inappropriate. *See e.g., Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 817 (1988) ("petition for writ of certiorari can expose the entire case to review").

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On Petition for a Writ of Certiorari to the United States Court of Appeal for the Eleventh Circuit

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SUPPLEMENTAL BRIEF FOR PETITIONERS

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SUPPLEMENTAL BRIEF FOR PETITIONERS

In our reply brief (Pet. Reply Br. 5, n.3), petitioners pointed out that this Court's resolution of *American National Red Cross v. S.G. & A.E.*, No. 91-594, would be highly relevant to disposition of the instant case. The Court decided *American National Red Cross* on June 19, 1992. Its holding in that case strongly supports petitioners' position.

1. In *American National Red Cross*, this Court held that the charter of the American National Red Cross authorizing that organization "to sue and be sued in courts of law and equity, State or Federal, within the jurisdiction of the United States" conferred original

jurisdiction on federal courts over all cases to which the Red Cross is a party. *See* 36 U.S.C. 2. The Court instructed that federal court jurisdiction is provided by such a provision "if, but only if, it specifically mentions the federal courts." Slip op. at 8.

2. This Court's holding in *American National Red Cross* dooms the government's contention in the instant case that the Tucker Act provides the sole basis of jurisdiction over petitioners' claims. As we have stated (Pet. Reply Br. 5, n.3), 29 U.S.C. 16(b)'s waiver of sovereign immunity in all material respects mirrors the relevant language at issue in *American National Red Cross*. Hence, section 16(b) of the FLSA states that "an action . . . may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees. . ." 29 U.S.C. 216(b). In short, like the provision at issue in *American National Red Cross*, section 16(b)'s waiver of sovereign immunity "specifically mentions the federal courts" (slip op. at 8), and thus it, too, provides federal courts with original jurisdiction over claims such as petitioners'.

3. Indeed, even the objections of the dissent in *American National Red Cross* are not a concern in the instant case. Justice Scalia's dissent viewed 36 U.S.C. 2 as conferring only the capacity to sue or be sued. Dissenting op. at 4. At the same time, however, the dissent, in analyzing this Court's precedent, specified that a provision authorizing actions to be *brought* in federal court *was* jurisdictional. Dissenting op. at 5-6. Even under the dissent's view, 29 U.S.C. 216(b) confers jurisdiction on federal district courts. As stated, section 16(b) specifically provides that an overtime *"action . . . may be maintained* against any employer (including a public agency) in any Federal or State court of competent jurisdiction. . ." 29 U.S.C. 216(b) (emphasis added).

4. In sum, as we have pointed out (Pet. Reply Br. 5, n.3), petitioners' jurisdictional argument is even stronger than the successful contentions made in *American National Red Cross*. To the extent that section 16(b) of the FLSA does not, by itself, confer jurisdiction on federal district courts, petitioners have argued that district courts certainly possess jurisdiction over claims, such as theirs, when that provision is read in conjunction with 28 U.S.C. 1331. Whether jurisdiction is conferred by 29 U.S.C. 216(b) alone, or in combination with 28 U.S.C. 1331, the salient point is that district court jurisdiction over petitioners' claims existed independent of the Tucker Act. The ruling of the court below now stands in conflict, not only with this Court's decision in *Bowen v. Massachusetts*, 487 U.S. 879 (1988), but also with its most recent holding in *American National Red Cross*.[1]

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[1] If the petition for a writ of certiorari is not granted, this case should be remanded to the Eleventh Circuit with an instruction that it reconsider its decision in light of this Court's holding in *American National Red Cross, supra*.